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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 2001

RICKEY BROWNLEE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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44 pp

QUESTION PRESENTED FOR REVIEW

WHETHER, IN LIGHT OF *APPRENDI V. NEW JERSEY*, 530 U.S. 466, 120 S.CT. 2348, 147 S.CT. 435 (2000), THE DISTRICT COURT EXCEEDED ITS SENTENCING JURISDICTION -- AND THUS COMMITTED A REVERSIBLE, NON-WAIVABLE ERROR -- BY SENTENCING THE DEFENDANT TO LIFE IMPRISONMENT, PURSUANT TO 21 U.S.C. § 841(B)(1)(A), WHERE THE INDICTMENT CHARGED ONLY A VIOLATION OF 21 U.S.C. § 841(A)(1) AND DID NOT ALLEGE THE DRUG QUANTITY NECESSARY TO TRIGGER THE ENHANCED PENALTY PROVISIONS OF § 841(B)(1)(A)?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

LIST OF PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

PETITION FOR WRIT OF CERTIORARI 1

OPINION BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 4

A. Procedural History 4

B. The Trial 4

C. The Jury Instruction's on 21 U.S.C. § 841(A)(1) 7

D. The Verdict And Sentencing 8

E. The Appeal 9

REASONS FOR GRANTING THE WRIT 11

I. The Court Should Grant The Writ To Resolve the Conflict 11

A. The Omission of an Element Of An Enhanced Offense Is A Jurisdictional Defect 14

B. The Split In the Circuits 17

CONCLUSION 17

TABLE OF AUTHORITIES

Page

Cases

Almendarez-Torres v. United States,
523 U.S. 224, 118 S.Ct. 1219,
140 L.Ed.2d 350 (1998) 16

Apprendi v. New Jersey,
530 U.S. 466, 120 S.Ct. 2348,
147 S.Ct. 435 (2000) . . . . . i, 9, 10, 11, 13-17, 19, 21

Castillo v. United States,
530 U.S. 120, 120 S.Ct. 2090,
147 L.Ed.2d 94 (2000) 19

Ex Parte Bain,
121 U.S. 1, 30 L.Ed. 849,
7 S.Ct. 781 (1887) 11, 12, 17

Harris v. United States,
149 F.3d 1304 (11th Cir. 1998) 13

Jones v. United States,
224 F.3d 1251 (11th Cir. 2000) 12

McCoy v. United States,
No. 00-16434 (11th Cir. Sept. 25, 2001) 13, 19, 20

Stirone v. United States,
361 U.S. 212, 4 L.Ed.2d 252,
80 S.Ct. 270 (1960) 11, 17, 21

United States v. Bjorkman,
Case Nos. 99-3302, et al. (7th Cir. Oct. 30, 2001),
2001 U.S. App. LEXIS 23398) 19

United States v. Brown,
995 F.2d 1493 (10th Cir.)
cert. denied, 510 U.S. 935,
114 S.Ct. 353, 126 L.Ed.2d 317 (1993) 12

United States v. Buckland,
259 F.3d 1157 (9th Cir. 2001),
rehearing en banc granted (9th Cir. Sept. 14, 2001) . . 18-19

United States v. Candelario,
240 F.3d 1300, (11th Cir.), *cert. denied*, ___ U.S. ___,
121 S.Ct. 2535, 150 L.Ed.2d 705 (2001) 20

United States v. Cernobyl,
255 F.3d 1215 (10th Cir. 2001) 20

United States v. Cevallos,
538 F.2d 1122 (5th Cir. 1976) 13

United States v. Cotton,
261 F.3d 397 (4th Cir. 2001) 17, 21

United States v. Cromartie,
Case No. 00-13957 (11th Cir. Oct. 3, 2001) 13, 19

United States v. Doggett,
230 F.3d 160 (5th Cir. 2000) 14

United States v. Fields,
242 F.3d 393 (D.C. Cir.), *modified*,
251 F.3d 1041 (D.C. Cir. 2001) 15

United States v. Floresca,
38 F.3d 706 (4th Cir. 1994) (en banc) 21

United States v. Fort,
248 F.3d 475 (5th Cir. 2001), *cert. denied*,
___ U.S. ___, ___ S.Ct. ___,
___ L.Ed.2d ___, 70 U.S.L.W. 3279 (U.S. Oct. 15, 2001)20

United States v. Gonzalez,
259 F.3d 355 (5th Cir.), *rehearing en banc granted*,
262 F.3d 455 (5th Cir. 2001) (en banc) 17

United States v. Hitchcock,
263 F.3d 878 (9th Cir. 2001) 18

United States v. Jones,
235 F.3d 1231 (10th Cir. 2000) 15

United States v. Krepper,
159 F.2d 958 (3rd Cir. 1946) 12

United States v. Longoria,
259 F.3d 263 (5th Cir.), *rehearing en banc granted*,
262 F.3d 455 (5th Cir. 2001) (en banc) 17

United States v. Maldenaldo,
Case No. 00-13347 (11th Cir. Oct. 17, 2001) (en banc) . . 13

United States v. Meacham,
626 F.2d 503 (5th Cir. 1980) 12

United States v. Mojica-Baez,
229 F.3d 292 (1st Cir. 2000),
cert. denied, ___ U.S. ___,
121 S.Ct. 2215,
150 L.Ed.2d 209 (2001) 19, 20

United States v. Moss,
252 F.3d 993 (8th Cir. 2001) 19, 21

United States v. Nance,
236 F.3d 820 (7th Cir. 2000),
cert. denied, ___ U.S. ___, ___ S.Ct. ___,
151 L.Ed.2d 43 (2001) 19, 20

United States v. Neder,
527 U.S. 1, 119 S.Ct. 1827,
144 L.Ed.2d 35 (1999) 20, 21

United States v. Prentiss,
256 F.3d 971 (10th Cir. 2001)
(en banc) 19

United States v. Promise,
255 F.3d 150 (4th Cir. 2001) 14

United States v. Ramirez,
242 F.3d 348 (6th Cir. 2001) 18

United States v. Rogers,
228 F.3d 1318 (11th Cir. 2000) 14

United States v. Shepard,
235 F.3d 1295 (11th Cir. 2000) 14

United States v. Strayhorn,
250 F.3d 462 (6th Cir. 2001) 18

United States v. Thomas,
248 F.3d 76 (2d Cir. 2001) (en banc) 17

United States v. Tran,
234 F.3d 798 (2d Cir. 2000),

rehearing en banc granted. 17, 18

United States v. Vazquez,
No. 99-3845 (3rd Cir. Oct. 9, 2001),
2001 U.S. App. LEXIS 21611 (en banc) 19

Vasquez v. Hillery,
474 U.S. 254, 106 S.Ct. 617,
88 L.Ed.2d 598 (1986) 20

Constitution, Statutes and Rules

18 U.S.C. § 924 19

18 U.S.C. § 1956 4

18 U.S.C. § 1957 4

21 U.S.C. § 841 . . . . . i, 4, 7, 8, 9, 13, 14, 15, 16, 17, 22

21 U.S.C. § 846 4

21 U.S.C. § 851 . . . . . 4, 13

28 U.S.C. § 1254(1) 1, 2

28 U.S.C. § 1255 12

Fed. R. Crim. P. 12(b)(2) 11

Fed. R. Crim. P. 52(b) 9, 10

SUP. CT. R. 13 1

U.S. Const., Amend. V 1

PETITION FOR WRIT OF CERTIORARI

Rickey Brownlee respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in 11th Cir. Case No. 99-14771-B on July 6, 2001.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and conviction of the United States District Court for the Southern District Florida, is contained in the **APPENDIX A**.

STATEMENT OF JURISDICTION

This Petition has been filed within 90 days of August 30, 2001, the date the United States Court of Appeals for the Eleventh Circuit denied Brownlee's Petition For Rehearing En Banc, a copy of which is contained in the **APPENDIX B**. *See* SUP. CT. R. 13. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional and statutory provisions:

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand

Jury, ... nor shall any person ... be deprived of life, liberty, or property without due process of law....

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public rial, by an impartial jury ... and to be informed of the nature and cause of the accusation....

21 U.S.C. § 841

(a) Unlawful acts

Except as authorized by his subchapter, it shall be unlawful for any person knowing or intentionally --

> (1) to manufacture, distribute, or dispense, or process with intent to manufacture, distribute, or dispense, a controlled substance....

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

> **(1)(A)** In the case of a violation of subsection (a) of this section involving--
>
> > **(ii)** 5 kilograms or more of a mixture or substance containing a detectable amount of ... cocaine....
>
> such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life.... If any person commits a violation of this subparagraph ... after two or more

prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release....

(1)(B) In the case of a violation of subsection (a) of this section involving--

> **(ii)** 500 grams or more of a mixture or substance containing a detectable amount of ... cocaine....

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years.... If any person commits a violation of this subparagraph ... after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment....

(1)(C) In the case of a controlled substance in schedule I or II, ... except as provided in sub-paragraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years.... If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years....

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On February 5, 1999, a federal grand jury sitting in the Southern District of Florida returned an eleven-count superseding indictment against Rickey Brownlee and four co-defendants. (*See* District Court Docket Entry "DE" 345). Count 1 alleged that Brownlee conspired to distribute "detectable amount[s]" of cocaine and heroin from July 31, 1986 through June 26, 1998, in violation of 21 U.S.C. §§ 841(a)(1) and 846. Counts 2-7 charged Brownlee with distributing "detectable amount[s]" of these drugs at various dates between November 1994 and December 1997.[1] Prior to trial, the government filed a "Second Offender Information," pursuant to 21 U.S.C. § 851, informing Brownlee that the government intended to seek enhanced penalties against Brownlee under 21 U.S.C. § 841 based on three prior felony convictions. (DE 389.)

Brownlee was tried in August 1999. On August 26, 1999, the jury acquitted him of Counts 2, 3, 4 and 6 but convicted him of Counts 1 and 5. (DE 499-501.)[2] On November 11, 1999, the

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[1] Counts 7-11 of the superseding indictment also charged Brownlee with conspiring to commit and with the commission of money laundering, in violation of 18 U.S.C. § 1956(h), 1956(a)(1)-(B)(i) and 1957.

[2] Brownlee was also convicted of the money laundering charges in Counts 7-11.

district court sentenced Brownlee to concurrent sentences of life imprisonment on Counts 1 and 5. (DE 533.)[3]

B. The Trial

The government began its case by establishing Brownlee's criminal record, including a federal conviction in 1982 for selling two kilograms of cocaine to an undercover agent (DE 567: 58-81) and a 1992 Florida state court guilty plea to racketeering and cocaine trafficking. (DE 568: 131-134, 152-153; Government Exhibits 76-C and 79.) In November 1993, Brownlee was released from state custody and placed on probation. (DE 568: 180.) By 1996, however, federal law enforcement agencies began receiving complaints from officials from the City of Opa-Locka, who reported that "they had a very large problem with narcotic distribution and mainly with the Rickey Brownlee organization." (DE 568: 277; DE 570: 810.) Based on these reports, federal agents targeted Brownlee for investigation. (DE 568: 281.)

The investigation that ensued produced no drug seizures from Brownlee. The evidence against him on the two drug counts of conviction came principally from Roger Thompson, a former co-defendant who agreed to testify against Brownlee in return for a sentence reduction. Thompson testified that he began selling drugs with Brownlee in 1980 and managed the "street operation" of Brownlee's organization until he went to prison in 1989. (DE 570: 590.) When Thompson was released in 1992, Brownlee told him that Jimmy Scanlon was "running" his organization while he was in prison and that Thompson could buy drugs from Scanlon. (DE

---

[3] Brownlee also received concurrent 10 and 20 year sentences on the money laundering convictions.

570: 597-599.) After Brownlee was released from prison himself in 1993, Thompson testified that he began obtaining drugs from Brownlee again and continued to do so until their arrests in 1998. (DE 570: 599-601, 620.)

Thompson claimed that Brownlee stored drugs in various locations, including Brownlee's gym, restaurant and car wash. (DE 570: 604, 651-653.) On April 3, 1996, Thompson sold one kilogram of cocaine to Katrina Johnson. (DE 570: 607-609.) He testified, however, that he obtained the cocaine from Brownlee and gave the proceeds of the sale to Brownlee. (DE 570: 609.)

Thompson subsequently sold two kilograms of cocaine to Johnson and an undercover agent on December 17, 1996. (DE 568: 318-327.) The only substantive drug count for which the jury convicted Brownlee, Count 5, involved this transaction. Thompson claimed that he picked up the drugs from Brownlee's gym and later delivered the proceeds to Brownlee. (DE 570: 609-617, 756.) Government surveillance partially corroborated Thompson's movements that day but did not show any exchanges of drugs or money between Thompson and Brownlee.

Between February and July 1997, the DEA kept Brownlee's gym under surveillance, and the government introduced numerous videotapes of the activity surrounding the gym. (DE 580: 1746-1752, 1782-1785.) The tapes revealed a pattern of people arriving with Brownlee at the gym, leaving in other vehicles, returning and leaving in still other vehicles. (DE 580: 1775, 1789.) Government agents believed that this activity was "suspicious" and indicative of drug trafficking. (DE 580: 1786-1789; DE 581: 1918.)

The investigation continued until January 1998, when Brownlee was arrested at his home. Although the search of the home produced no drugs, the government claimed that Brownlee lived an extravagant lifestyle with "thousand dollar shoes" and expensive jewelry, cars and furnishings. (DE 569: 391-395.) The government also put on financial experts, who testified that Brownlee's legitimate businesses could not have supported his lifestyle. (DE 583: 2317-2345; DE 584: 2594-2635, 2801; DE 590: 3668, 3681.)

C. The Jury Instructions On 21 U.S.C. § 841(a)(1)

When it came time to instruct the jury, the court explained the elements of the Section 841(a)(1) offenses as follows:

> With respect to Counts 2, 3, 4, 5, and 6, Title 21 United States Code, Section 841(a)(1), makes it a Federal crime or offense for anyone to possess a "controlled substance" with intent to distribute it.
>
> ... [C]ocaine [is a] "controlled substance[]" within the meaning of the law.
>
> The Defendant, Rickey Brownlee, can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:
>
> First: That the Defendant knowingly and willfully possessed ... cocaine as charged; and
>
> Second: That the Defendant possessed the substance with the intent to distribute it.

> To "possess with intent to distribute" simply means to possess with intent to deliver or transfer possession of a controlled substance to another person, with or without any financial interest in the transaction.

(DE 495: 21-22.)

There was no instruction at all as to Section 841(b). And, the jury was ***not*** advised that the quantity of drugs was an element or essential "fact" that they jury had to consider and find beyond a reasonable doubt. The verdict form the jury took to the jury room was a general verdict form, asking for no special findings.

D. The Verdict and Sentencing

As previously noted, the jury acquitted Brownlee of Counts 2, 3, 4 and 6 but convicted him of Counts 1 and 5. Prior to sentencing, the Probation Officer prepared a Presentence Investigation Report ("PSI") and calculated, based on an interview with the prosecutor, that Counts 1 and 5 involved "more than 150 kilograms of cocaine." On October 26, 1999, Brownlee filed written objections to this calculation, relying on his acquittals on Counts 2-4, and arguing that, at most, he should be held accountable for the two kilograms at issue in Count 5. (DE 524: 11-14.) At sentencing on November 11, 1999, however, the district court summarily overruled the objections and upheld the Probation Officer's calculation using a preponderance of evidence standard. (DE 593: 94.) Using 150 kilograms as the applicable drug quantity, the court sentenced Brownlee under 21 U.S.C. § 841(b)(1)(A). Due to Brownlee's criminal record, Section 841(b)(1)(A) required the court to impose, *see* pp. 2-3 *supra*, and the court did so impose, a

mandatory sentence of life imprisonment on Brownlee on Counts 1 and 5. (DE 593: 155; DE 533.)

E. THE APPEAL

Brownlee appealed his conviction and sentence to the United States Court of Appeals for the Eleventh Circuit on various grounds. Before his initial brief was filed, this Court issued its momentous decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 S.Ct. 435 (June 26, 2000). Based primarily on *Apprendi*, Brownlee argued *inter alia* that: (1) Section 841(a)(1) was unconstitutional on its face for entrusting the essential drug quantity findings to judges at sentencing under a preponderance of the evidence standard, rather than requiring the government to plead drug quantities in indictments submitted to grand juries and to prove them before petit juries beyond a reasonable doubt; (2) even if § 841(a)(1) was constitutional, the government's failure to plead the drug quantity necessary to trigger the mandatory life sentencing provision of § 841(b)(1)(A) constituted a jurisdictional defect that constituted *per se* reversible error; and (3) at the very least, the government's failure to properly plead and prove drug quantity constituted "plain error" under Fed. R. Crim. P. 52(b).

On July 6, 2001, the Eleventh Circuit affirmed both Brownlee's conviction and sentence in an unpublished *per curiam* opinion. *See* **APPENDIX A**. The Eleventh Circuit correct noted that, absent the drug quantity findings made by the district court, Brownlee's maximum sentence under § 841(b)(1)(C), without regard to drug quantity, was thirty years. *Id.* The Eleventh Circuit further noted that the government had conceded that "there was an Apprendi error with respect to his sentences and that it was plain." *Id.* However, the Eleventh Circuit nonetheless affirmed Brownlee's

life sentences on Counts 1 and 5. In doing so, the Eleventh Circuit did not address Brownlee's contention that § 841(a)(1) was unconstitutional. However, it ruled that "the Apprendi error" was neither "a jurisdictional defect [n]or a structural error requiring a per se reversal." *Id.* Purporting to use the "plain error" standard in Rule 52(b), the Eleventh Circuit found that Brownlee failed to establish that the conceded error "affected his substantial rights" because of the "overwhelming and undisputed evidence at trial regarding drug quantities sufficient to support his life sentences." *Id.*

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT THE WRIT TO RESOLVE THE CONFLICT AMONG THE CIRCUITS ON AN IMPORTANT, AND RECURRING QUESTION OF FEDERAL CONSTITUTIONAL LAW RAISED BY *APPRENDI v. NEW JERSEY*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) -- NAMELY, WHETHER A DISTRICT COURT EXCEEDS ITS SENTENCING JURISDICTION AND THUS COMMITS A REVERSIBLE, NON-WAIVABLE ERROR BY SENTENCING THE DEFENDANT FOR AN ENHANCED OFFENSE THAT IS NOT CHARGED IN THE INDICTMENT

The Fifth Amendment indictment clause states: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." Before the decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), this Court and the lower courts had agreed that the omission of an essential element from the indictment is a substantive, non-waivable, jurisdictional defect, requiring reversal without proof of prejudice. *See* Fed. R. Crim. P. 12(b)(2) (an objection that the indictment fails to show jurisdiction in the court or to charge an offense "shall be noticed by the court at any time during the pendency of the proceedings"); *Stirone v. United States*, 361 U.S. 212, 217, 4 L.Ed.2d 252, 80 S.Ct. 270 (1960) (citing *Ex Parte Bain*, 121 U.S. 1, 12-13, 30 L.Ed. 849, 7 S.Ct. 781 (1887), as the case where Court first stated its "opinion that an indictment found by a grand jury was indispensable to the power

of the court to try the petitioner for the crime for which he was charged"; "[t]he *Bain* case ... has never been disapproved"; the deprivation of "the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury ... is far too serious to be treated as nothing more than a variance and then dismissed as harmless error"); *United States v. Krepper*, 159 F.2d 958, 970 (3rd Cir. 1946) (Fifth Amendment indictment clause is jurisdictional); *United States v. Meacham*, 626 F.2d 503, 509-510 (5th Cir. 1980) (defendant's Fifth Amendment right to a grand jury indictment setting forth every element of an offense is jurisdictional, and non-waivable by guilty plea or by defendant's failure to raise issue before district court or on appeal; Rule 12(b)(2) requires court of appeals to raise the issue *sua sponte* even if the defendant has not raised it); *United States v. Brown*, 995 F.2d 1493, 1505 (10th Cir.) ("failure of the indictment to allege all the essential elements of an offense ... is a jurisdictional defect requiring dismissal" and "[t]he absence of prejudice to the defendant does not cure what is necessarily a substantive, jurisdictional defect in the indictment"), *cert. denied*, 510 U.S. 935, 114 S.Ct. 353, 126 L.Ed.2d 317 (1993).

Indeed, prior to the decision in Brownlee's case, even where the indictment had stated "an offense," the Eleventh Circuit had always treated a sentence above the statutory maximum for the charge set forth in the indictment as a non-waivable error that was noticeable at any time -- at any stage of the proceedings -- requiring reversal *per se*. *See Jones v. United States*, 224 F.3d 1251, 1259 (11th Cir. 2000) (vacating general sentence under 28 U.S.C. § 2255, where it exceeded the statutory maximum for a count; criticizing lower court for denying relief based upon the fact that the defendant suffered no prejudice; "The test ... is not

what the court might have done; the test is whether the original sentence comported with the law"); *United States v. Cevallos*, 538 F.2d 1122, 1128 (5th Cir. 1976) (granting Rule 35 motion despite defendant's failure to appeal, where court had not followed procedures mandated in 21 U.S.C. § 851 for imposing enhanced sentence; sentence "exceeded statutory maximum," and was therefore illegal); *see also Harris v. United States*, 149 F.3d 1304, 1307 (11th Cir. 1998) (on § 2255 review, vacating enhanced sentence under § 851, even though defendant failed to object to the enhancement on jurisdictional grounds at trial or on direct appeal; because government had failed to file the § 851 information as mandated, court was without jurisdiction to impose the enhanced sentence; defendant need not show "cause and prejudice").

In the decision below, as well as in several subsequent published decisions, *see United States v. Maldenaldo*, Case No. 00-13347 (11th Cir. Oct. 17, 2001) (en banc), 2001 U.S. App. LEXIS 22406; *United States v. Cromartie*, Case No. 00-13957 (11th Cir. Oct. 3, 2001); *McCoy v. United States*, No. 00-16434 (11th Cir. Sept. 25, 2001), 2001 U.S. App. LEXIS 20900, however, the Eleventh Circuit has rejected these lines of authority. Its decision in this case affirmed a sentence of life imprisonment, despite the fact that such a sentence far exceeded the statutory maximum for the simple violation of 21 U.S.C. § 841(a)(1) charged in the indictment. The Eleventh Circuit specifically rejected Brownlee's arguments that such a defect was a non-waivable "jurisdictional" or structural defect. And in so doing, it rejected both the language and the logic of *Apprendi*, as well as the reasoned decisions of other circuit courts of appeals. This is the time for the Court to declare the *Apprendi* error to be jurisdictional in nature and to instruct the Eleventh Circuit to correct it.

A. The Omission of an Element of an Enhanced Offense, is a Jurisdictional Defect

In *Apprendi*, the Court explained that as matter of constitutional law, "facts that expose a defendant to a punishment greater than that otherwise legally prescribed" are "by definition 'elements' of a separate legal offense." *Apprendi*, 120 S.Ct. at 2359 n. 10; *see also id.* at 2365 n. 19 (any factor that increases the penalty for a crime beyond the statutory maximum, "fits within the usual definition of an 'element' of the [greater] offense"). And, indeed, following *Apprendi*, the lower courts (including the Eleventh Circuit) have applied this reasoning in the context of the federal drug statutes, and have treated § 841(b)(1)(A) and § 841(b)(1)(B) as "separate legal offenses" from the simple violation of § 841(a)(1). *See, e.g., United States v. Rogers*, 228 F.3d 1318, 1328 (11th Cir. 2000) ("we hold today that drug quantity in section 841(b)(1)(A) and section 841(b)(1)(B) cases must be charged in the indictment and proven to a jury beyond a reasonable doubt in light of *Apprendi*)"; *United States v. Shepard*, 235 F.3d 1295, 1297 (11th Cir. 2000) (citing "separate legal offense" language from *Apprendi*; holding "[a]s an element of the offense, drug quantity must be charged in the indictment"), *cert. denied*, ___ U.S. ___, ___ S.Ct. ___, 151 L.Ed.2d 84 (2001). *See also United States v. Promise*, 255 F.3d 150, 156-157 (4th Cir. 2001) (en banc) ("*Apprendi* dictates that in order to authorize the imposition of a sentence exceeding the maximum allowable without a jury finding of a specific threshold drug quantity, the specific threshold quantity must be treated as an element of an aggravated drug trafficking offense, *i.e.*, charged in the indictment and proved to the jury beyond a reasonable doubt"); *United States v. Doggett*, 230 F.3d 160, 164 (5th Cir. 2000) ("[t]he

structure of § 841 is similar to that described by Justice Thomas in his concurrence to *Apprendi*, "if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact 'of whatever sort' the core crime and the aggravating fact together constitute an aggravated crime.... The aggravating fact is an element of the aggravating crime"), *cert. denied*, 531 U.S. 1177, 121 S.Ct. 1152, 148 L.Ed.2d 1014 (2001); *United States v. Jones*, 235 F.3d 1231, 1236-1237 (10th Cir. 2000) ("the quantity of drugs involved in a violation of § 841 is an essential element of the offense if that fact exposes the defendant to a heightened maximum sentence under § 841(b)(1)(A) or (B)"; "Jones was indicted and convicted of the offenses of distributing and possessing with intent to distribute an unspecified quantity of cocaine base, see 21 U.S.C. § 841(b)(1)(C), but sentenced for the different offenses of distributing and possessing with intent to distribute at least fifty grams of cocaine base, *see* 21 U.S.C. § 841(b)(1)(A)(iii)"). *Accord United States v. Fields*, 242 F.3d 393, 395 (D.C. Cir.), *modified*, 251 F.3d 1041 (D.C. Cir. 2001).

Given the "elemental" nature of drug quantity in the "separate legal offense" set forth in § 841(b)(1)(A), it is only logical that the omission of the enhancing element -- drug quantity -- from the indictment deprives the district court of jurisdiction to sentence for the enhanced offense. While, admittedly, *Apprendi* was not an Indictment Clause case,[4] the Court nevertheless made clear that the

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[4] Because *Apprendi* was an appeal from a state prosecution, the Court did not analyze the case in Fifth Amendment Indictment Clause terms. *See Apprendi*, 120 S.Ct. at 2356 n. 20 (explaining (continued...)

omission of an enhancing element was a "jurisdictional" error, by stating:

> The evidence we describe that punishment was, by law, tied to the offense (enabling the defendant to discern, barring pardon or clergy, his punishment from the face of the indictment), and the evidence that American judges have exercised sentencing ***discretion*** within a legally prescribed range (enabling the defendant to discern from the statute of indictment what maximum punishment conviction under the statute could bring), point to a single, consistent conclusion: ***The judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment*** and found by the jury.

Apprendi, 120 S.Ct. at 2359 n. 10 (emphasis added).

Accordingly, where an indictment charges a violation of § 841(a) and the supporting facts allege only the minimum quantity required by § 841(b)(1)(C), a court's sentencing jurisdiction extends only to the imposition of a sentence within the thirty-year maximum pursuant to § 841(b)(1)(C). This is so, because a court

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[4](...continued)
that the Fifth Amendment indictment clause had not been applied to the states *via* the Fourteenth Amendment, and for that reason, the petitioner in *Apprendi* had not brought his claim under the Indictment Clause). Nevertheless, the Court cited with approval the Fifth Amendment analysis in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), *see Apprendi*, 120 S.Ct. at 2356 n.3, where it previously acknowledged that ***if*** a "sentencing provision" actually defines a separate crime "then the Government must write an indictment that mentions the additional element." *See Almendarez-Torres*, 523 U.S. at 226.

that imposes a sentence for the violation of § 841(a) in accordance with the greater penalties of § 841(b)(1)(A) or § 841(b)(1)(B) has then sentenced the defendant for an offense that was not alleged in the indictment -- specifically, the essential element of drug quantity. When challenged, a conviction or sentence based on charges not initially brought by a grand jury must be *per se* reversed because, unlike most ordinary trial errors, "an indictment found by a grand jury is indispensable to the power of the court to try [the defendant] for the crime with which he was charged." *Ex Parte Bain*, 121 U.S. 1, 12-13, 30 L.Ed. 849, 7 S.Ct. 781 (1887). Likewise, a "court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *Stirone v. United States*, 361 U.S. 212, 217, 4 L.Ed.2d 252, 80 S.Ct. 270 (1960).

B. The Split In the Circuits

Consistent with the logic and language of *Apprendi*, panels of the Second, Fourth and Fifth Sixth Circuits have held that drug quantity is an essential element of Title 21 narcotic offenses that must not only be proved at trial but pleaded and proved to a grand jury ***and*** that the failure to do so constitutes a structural defect that deprives the district court of jurisdiction to sentence a defendant to an uncharged offense or penalty. *See United States v. Cotton*, 261 F.3d 397 (4th Cir. 2001); *United States v. Gonzalez*, 259 F.3d 355 (5th Cir.), *rehearing en banc granted*, 262 F.3d 455 (5th Cir. 2001) (en banc); *United States v. Longoria*, 259 F.3d 263 (5th Cir.), *rehearing en banc granted*, 262 F.3d 455 (5th Cir. 2001) (en banc); *United States v. Tran*, 234 F.3d 798 (2d Cir. 2000), *rehearing en banc granted sub nom. United States v. Thomas*, 248 F.3d 76 (2d Cir. 2001) (en banc). The Sixth Circuit also appears to be following this approach, albeit without lengthy analysis. *See, e.g.,*

United States v. Strayhorn, 250 F.3d 462 (6th Cir. 2001); *United States v. Ramirez*, 242 F.3d 348 (6th Cir. 2001).

The reasoning employed by these courts is best expressed by the Second Circuit in *Tran*:

> Where an indictment fails to allege each material element of the offense, it fails to charge that offense. "[A] 'failure of the indictment to charge an offense may be treated as [a] jurisdictional' defect, ... and an appellate court must notice such a flaw even if the issue was raised neither in the district court or on appeal...."
>
> If the district court acts beyond its jurisdiction by ... sentencing a defendant for an offense not charged in the indictment, this Court must notice such error and act accordingly to correct it, regardless of whether the defendant has raised the issue.
>
> ***... Where the district court acted without subject matter jurisdiction, this Court does not have the discretion not to notice and correct the error; it must notice and correct the error.***

Tran, 234 F.3d at 806-07 (emphasis added). The Second Circuit in *Tran* also refused to even entertain the government's claim that the Indictment Clause error should be reviewed for "plain error."

The Ninth Circuit has gone one step further even than the Second, Fourth, Fifth and Sixth Circuits and found (in agreement with Brownlee's alternative position) that the federal narcotics statutes are unconstitutional on their face. *See United States v. Hitchcock*, 263 F.3d 878 (9th Cir. 2001); *United States v.*

Buckland, 259 F.3d 1157 (9th Cir. 2001), *rehearing en banc granted* (9th Cir. Sept. 14, 2001).

This Court's decision in *Castillo v. United States*, 530 U.S. 120, 120 S.Ct. 2090, 147 L.Ed.2d 94 (2000), at the very least supports conclusions reached by the Second, Fourth, Fifth and Sixth Circuits. *Castillo* preceded *Apprendi* by only a few months, and stated a similar rule in the context of 18 U.S.C. § 924(c). Significantly, the Court reversed *per se* in *Castillo*, simply due to the imposition of an enhanced mandatory minimum (well within the statutory maximum), where the enhancing factor was not set forth in the indictment.

Nonetheless, the First, Seventh, Eighth, Tenth and Eleventh Circuits (in this case and others) have flatly disagreed with the analysis of Second, Fourth, Fifth and Sixth Circuits concerning the jurisdictional nature of the "*Apprendi* error" committed here. *See, e.g., United States v. Cromartie*, Case No. 00-13957 (11th Cir. Oct. 3, 2001); *McCoy v. United States*, No. 00-16434 (11th Cir. Sept. 25, 2001), 2001 U.S. App. LEXIS 20900; *United States v. Bjorkman*, Case Nos. 99-3302, et al. (7th Cir. Oct. 30, 2001), 2001 U.S. App. LEXIS 23398); *United States v. Prentiss*, 256 F.3d 971 (10th Cir. 2001) (en banc) (majority opinion); *United States v. Moss*, 252 F.3d 993 (8th Cir. 2001) (majority opinion); *United States v. Nance*, 236 F.3d 820 (7th Cir. 2000), *cert. denied*, ___ U.S. ___, ___ S.Ct. ___, 151 L.Ed.2d 43 (2001); *United States v. Mojica-Baez*, 229 F.3d 292 (1st Cir. 2000), *cert. denied*, ___ U.S. ___, 121 S.Ct. 2215, 150 L.Ed.2d 209 (2001). *See also United States v. Vazquez*, No. 99-3845 (3rd Cir. Oct. 9, 2001), 2001 U.S. App. LEXIS 21611 (en banc) (denying relief to defendant under a

"plain error" analysis but not discussing whether error was jurisdictional).[5]

These circuits have expressly held that a Fifth Amendment Indictment Clause error is ***not*** "jurisdictional" and, therefore, is waivable and subject to "plain error" review. In so ruling, these circuits rely heavily on an analogy to *United States v. Neder*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). *See, e.g., McCoy*, 2001 U.S. App. LEXIS 20900, at *11-12; *Nance*, 236 F.3d at 825; *Mojica-Baez*, 229 F.3d at 311.

In *Neder*, however, the Court was only concerned with the failure, at trial, to submit an element of an offense that ***was*** properly charged in the underlying indictment to the petit jury for consideration through a jury instruction. *Neder* did not involve the failure to submit an element to a grand jury to secure the indictment in the first instance. Such errors cannot be rendered "harmless" by reviewing the sufficiency of the trial record -- as is required for most trial errors under Rule 52 -- because the determinations made by the grand and petit juries are entirely separate. Relying on a petit jury's determination to find a defendant guilty of a crime never found by a grand jury would usurp the role of the grand jury itself. As this Court recognized in *Vasquez v. Hillery*,

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[5] The Fifth, Tenth and Eleventh Circuits have also disagreed with the Ninth Circuit's conclusion that the federal drug statutes are unconstitutional on their face. *See United States v. Candelario*, 240 F.3d 1300, 1311 n. 16 (11th Cir.), *cert. denied*, ___ U.S. ___, 121 S.Ct. 2535, 150 L.Ed.2d 705 (2001); *United States v. Cernobyl*, 255 F.3d 1215 (10th Cir. 2001); *United States v. Fort*, 248 F.3d 475 (5th Cir. 2001), *cert. denied*, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, 70 U.S.L.W. 3279 (U.S. Oct. 15, 2001).

474 U.S. 254, 263, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986), a grand jury is "'not bound to indict in every case where a conviction can be obtained.'" (Citation omitted.) Therefore, "it is 'utterly meaningless' to posit that any rational jury ***could*** or ***would*** have indicted [the defendant for a different crime], because it is plain that this grand jury ***did not***, and, absent waiver, a constitutional verdict cannot be had on an unindicted offense." *United States v. Floresca*, 38 F.3d 706, 712 (4th Cir. 1994) (en banc) (emphasis in original). For these reasons, *Neder* is inapposite to Indictment Clause errors. *Cotton*, 261 F.3d at 407; *Tran*, 234 F.3d at 806-807. Certainly, nothing in *Neder* purported to overrule *Stirone*'s holding that Indictment Clause errors were *per se* reversible. *See Moss*, 252 F.3d at 1004 (Arnold, J., dissenting) ("[a]s far as I am aware, no case has ever held that the omission of an element of a crime from an indictment can be harmless error").

In the instant case, the Eleventh Circuit expressly affirmed Brownlee's life sentences based upon a "plain error" review that hinged entirely on the Eleventh Circuit's views concerning the "overwhelming" nature of the evidence introduced before the ***petit*** jury ***at trial***. Its opinion, therefore, is in direct conflict with the approaches taken by *Stirone* and the Second, Fourth, Fifth, Sixth and Ninth Circuits with respect to Indictment Clause errors. A defendant's entitlement to review and to relief should not vary from circuit to circuit.

Few issues in recent years has so divided the federal judiciary. Already, four circuits -- the Third, Fourth, Tenth and Eleventh -- have reviewed *Apprendi* issues *en banc*. None of these *en banc* opinions were unanimous and the Fourth Circuit (in *Promise*) remains evenly divided (4-4) on many issues. Rehearings

remain pending in still three more circuits -- the Second, Fifth and Ninth. The conflicts on these important constitutional questions are clearly ripe for review and resolution by this Court. In the interests of justice for Mr. Brownlee, who is serving an illegal life sentence, and in order to assure uniformity of review and of relief under *Apprendi*, the Court should grant certiorari to decide whether the sentencing of a defendant for an enhanced offense, not charged in the indictment, must be deemed a "jurisdictional error" and hence, non-waivable, and reversible *per se* and/or whether Section 841(a) is unconstitutional on its face.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully request that his Petition For a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

JULY 0 6, 2001

No. 99-14771

D. C. Docket No. 97-00662-CR-KMM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICKEY BROWNLEE,

Defendant-Appellant.

Appeal from the United States District Court

for the Southern District of Florida

(July 6, 2001)

Before BARKETT and HULL, Circuit Judges, and LIMBAUGH*, District Judge.

PER CURIAM:

*Honorable Stephen N. Limbaugh, U.S. District Judge for the Eastern District of Missouri, sitting by designation.

Appellant Rickey Brownlee appeals his convictions for drug offenses, money laundering, and illegal monetary transactions. Brownlee also challenges his life sentences on his drug offenses. More specifically, Brownlee argues on appeal: (1) that the district court's evidentiary rulings violated his Fifth and Sixth Amendment rights by permitting the

government to convict him based on opinions of law enforcement experts and Brownlee's alleged reputation as a criminal and that the prosecutor compounded the evidentiary errors by relying heavily on the improper evidence in his closing argument; (2) that the district court erred in allowing the government to prove the federal conspiracy charges by introducing Brownlee's prior state court conviction for the same conspiracy; and (3) that the district court committed plain error in sentencing Brownlee to life imprisonment in violation of Apprendi v. New Jersey, 530 U.S. 466 (2000).

After careful review and oral argument, we affirm. While we find no harmful or reversible error with respect to any of Brownlee's contentions, we discuss briefly certain issues he raised.

I. BACKGROUND

A federal grand jury in the Southern District of Florida returned a third superseding indictment charging Appellant Brownlee and co-defendants with the following eleven counts: one count of conspiracy to distribute cocaine and heroin from July 31, 1986 through June 26, 1998, in violation of 21 U.S.C. §§ 841(a)(1), 846 (Count 1); three counts of possession with intent to distribute heroin, in violation of 21 U.S.C. § 841(a)(1) (Counts 2, 4, 6); two counts of possession with intent to distribute cocaine (Counts 3, 5); one count of conspiracy to launder proceeds of drug trafficking activities, in violation of 18 U.S.C. § 1956(h) (Count 7); one count of substantive money laundering, in violation of 18 U.S.C. § 1956(a)(1)(B)(i) (Count 8); and three counts of

engaging in monetary transactions of more than $10,000 using drug proceeds, in violation of 18 U.S.C. § 1957 (Counts 9-11). Defendants Willie Younger and Roger Thompson were both severed from the trial of Brownlee and his co-defendant Tony Martin. After filing a pre-trial notice under 21 U.S.C. § 851 of Brownlee's prior drug convictions, the government proceeded to trial against Brownlee and Martin.

The jury acquitted Martin of all charges and acquitted Brownlee of Counts 2, 3, 4, and 6. The jury found Brownlee guilty of Counts 1, 5, and 7-11, however. On November 11, 1999, the district court sentenced Brownlee to life imprisonment with respect to Counts 1 and 5; twenty years' imprisonment with respect to Counts 7 and 8; and 10 years' imprisonment with respect to Counts 9-11, all to be served concurrently. The district court also sentenced Brownlee to a ten year term of supervised release and fined him $1,000,000. Brownlee timely appealed.

II. DISCUSSION

A. District Court's Evidentiary Rulings

We first address Brownlee's challenges to numerous evidentiary rulings by the district court. We review the district court's evidentiary rulings for abuse of discretion. United States v. Range, 94 F.3d 614, 620 (11th Cir. 1996). The trial court has broad discretion in determining the admissibility of evidence. Id. "'Even where an abuse of discretion is shown, non-constitutional evidentiary errors are not grounds for reversal absent a reasonable likelihood that the defendant's substantial rights were

affected." Id. (quoting United States v. Sellers, 906 F.2d 597, 601 (11th Cir. 1990)).

Brownlee challenges testimony given by: United States Probation Officer Wayne Custis; state prosecutor Oscar Gelpi[1]; DEA agent Daryn Johnson; DEA agent Robert-Barrett; FBI agent Rodney Morgan; IRS agent Paul Robarge; IRS agent Ron Wise; Ralph Becker; and Rick Norton. Specifically, Brownlee claims, inter alia, that these witnesses: (1) testified to opinions regarding Brownlee and his alleged drug activity that were unsupported by any personal knowledge; (2) testified to opinions about Brownlee's "intent;" (3) expressed opinions about the credibility of other witnesses; and (4) "interpreted" events and tape-recorded conversations for the jury. Brownlee complains that many of the "opinions" offered constituted rank hearsay and that the government's emphasis on this testimony during its closing argument compounded the prejudice to him from this evidence.

In response, the government argues that the challenged testimony was proper lay opinion testimony, proper "modus operandi" testimony, and out-of-court statements properly introduced for purposes other than the truth of the matter asserted. In many instances, the government contends that the allegedly offending testimony was brought out in redirect examination to clarify testimony elicited by Brownlee's counsel on cross-examination. Finally, the government claims that some

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[1] The transcripts reflect the spelling of the state prosecutor's name as "Gelpi," but the government's brief uses "Ghelpi." We rely on the transcripts.

of the evidence regarding Brownlee's reputation was used only against codefendant Martin in an effort to demonstrate Martin's knowledge of Brownlee's illegal drug activities. The government stresses that the district court specifically instructed the jury not to consider such evidence against Brownlee himself. Even assuming arguendo that the district court erred in certain evidentiary rulings, the government argues that Brownlee's substantial rights were not violated in light of the overwhelming evidence against Brownlee supporting his convictions.

While we agree with the government that most of the challenged testimony was properly admitted, we find that the district court abused its discretion in allowing certain portions of the testimony offered by state prosecutor Oscar Gelpi concerning Brownlee's 1989 guilty plea to state racketeering and drug trafficking charges. Through Gelpi, the government introduced the state court judgment and commitment against Brownlee, as well as the criminal information in the state case, which included charges subsequently dismissed. This testimony establishing Brownlee's prior state guilty plea was properly admitted as an admission of a party opponent. See Fed. R. Evid. 801(d)(2)(A). Testimony about Brownlee's actual statements or admissions during the plea colloquy, which Gelpi witnessed, also would have been admissible. However, Gelpi's hearsay-riddled summary of the evidence allegedly supporting Brownlee's prior guilty plea did not constitute an admission and was improperly admitted. Unless Gelpi personally observed the drug-related and money-laundering activities to which he testified, his testimony

regarding Brownlee's prior drug purchases and operation appears to be based on the hearsay statements of others. Thus, we agree with Brownlee that certain portions of Gelpi's testimony should have been excluded. Nonetheless, there is no reasonable likelihood that this error in connection with the admission of the evidence underlying the state conviction affected Brownlee's substantial rights because at trial Brownlee admitted his drug trafficking activities prior to the 1989 state conviction. Accordingly, the erroneous admission of this testimony was harmless.

In conclusion, there are some evidentiary errors with respect to Brownlee's trial, especially with regard to state prosecutor Gelpi's testimony. However, the overwhelming direct evidence against Brownlee, such as video and audio tapes of drug transactions and the testimony of Brownlee's three co-conspirators, as well as the physical evidence and extensive financial records offered at trial, amply supported Brownlee's conviction. It is clear, as the government argues, that the jury was not unduly influenced by the allegedly improper evidence where it acquitted Brownlee of several charges in the indictment. In addition, the record as a whole reveals that any errors in the court's evidentiary rulings were harmless and created no reasonable likelihood that Brownlee's substantial rights were affected.

A. Government's Use of Overlapping State Conspiracy Conviction

Brownlee next argues that the government's use at trial of his overlapping state conviction as substantive proof of the federal

conspiracy charged in Count 1 of the third superseding indictment violated his due process and confrontation rights under the Fifth and Sixth Amendments to the Constitution.

The federal conspiracy charges in Count 1 encompassed drug trafficking activity that was the subject of Brownlee's guilty plea in state court. As Brownlee concedes, the doctrine of dual sovereignty permits the federal prosecution of an elementally identical offense already prosecuted by a State consistent with the Double Jeopardy clause. Heath v. Alabama, 474 U.S. 82, 88 (1985) ("When a defendant in a single act violates the 'peace and dignity' of two Sovereigns by breaking the laws of each, he has committed two distinct 'offenses.'" (citations omitted). As discussed above, the admission of Brownlee's state guilty plea in the federal case was proper as an admission of a party opponent or admission against interest.

Brownlee claims that the use of this evidence, not as an admission, but to collaterally stop him from defending on the federal charges, was improper. He asserts that the prosecutor's closing argument demonstrates the improper collateral estoppel effect given to the state conviction at his federal trial. For example, Brownlee objects to the following portion of the closing:

> What he pled guilty [to] in the state, when he pled
> guilty to that, that counted for this case.
> He's done on this case, based upon his guilty
> plea in-the state. It's a separate jurisdiction.

His guilty plea there to conspiracy counts for your determination here.

The government argues, in any event, that its rebuttal closing argument., containing the allegedly offending material, was an appropriate and permissible response to the argument of Brownlee's counsel that Brownlee had already pled guilty to and been punished for the state charges and that the state charges had nothing to do with the instant federal charges.

Viewing the prosecutor's statements in context of the entire trial, it does not appear that an improper collateral estoppel effect was given to the state conviction for purposes of the federal conspiracy charged in Count 1. First, the state charges spanned only a three-year period, while the federal offenses charged in Count 1 of the indictment spanned a twelve-year period. Second, because the defense argued that the state crimes had nothing to do with the federal prosecution and that; Brownlee had been amply punished for those crimes, the government's argument in rebuttal that the state crime "counted" appropriately called the jury's attention to the -state guilty plea as an admission in the federal case, without seeking to afford the state conviction a collateral estoppel effect. The use of similar language in closing arguments with respect to a defendant's confession (a more traditional admission) would certainly be appropriate (i.e., "the defendant is done in this case based upon his

confession to the crime."). Thus, the use of Brownlee's state guilty plea in his federal trial did not violate his Fifth and Sixth Amendment rights.

B. Apprendi Error

Finally, we address Brownlee's argument that his concurrent life sentences on Counts 1 and 5 of the indictment violate Apprendi because the district court made drug quantity findings and utilized those findings to increase his sentence above the otherwise permissible thirty-year statutory maximum penalty permitted by 21 U.S.C. § 841(b)(1)(C) without regard to drug quantity.[2]

Brownlee was convicted in Count 1 of conspiracy to distribute cocaine and heroin from July 31, 1986 through June 26, 1998, in violation of 21 U.S.C. § 846. Brownlee was also convicted of Count 5, which charged his possession with intent to distribute cocaine on December 17, 1996. The indictment contained no allegation of drug quantity with respect to either count and the issue of drug quantity was not submitted to the jury. Based on evidence at trial, the PSI reported that

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[2] Prior to trial, the government filed a § 851 information setting forth Brownlee's two prior drug felony convictions. 21 U.S.C. § 851. Because Brownlee had prior felony drug offenses, the maximum statutory penalty for Brownlee's drug offenses under 21 U.S.C. § 841(b)(1)(C) was thirty years without regard to drug quantity. In addition, Brownlee has not raised any issues on appeal regarding the district court's findings under the Sentencing Guidelines; thus, we focus on the Apprendi error.

the conspiracy offense charged in Count 1 involved over 150 kilograms of cocaine and that the drug offense charged in Count 5 involved 2 kilograms of cocaine. Brownlee disputed the 150 kilograms amount reported by the PSI in connection with Count 1 but did not challenge the finding of 2 kilograms in connection with Count 5.

Brownlee raises the Apprendi issue for the first time on appeal. Thus we review for plain error only. See United States v. Gerrow, 232 F.3d 831, 833 (11th Cir. 2000).[3] "Four requirements must be met before we can reverse a district court for plain error." United States v. Humphrey, 164 F.3d 585, 588 (11th Cir. 1999). "First, there must be an error. Second, the error must be plain. Third, the error must affect substantial rights of the defendant. Fourth, the error must seriously affect the fairness, integrity, or public reputation of a judicial proceeding." Id. at 588 n.3 (citing United States v. Olano, 507 U.S. 725, 732 (1993)).

Because Brownlee received life sentences over the thirty-year statutory maximum provided by 21 U.S. C. § 841(b)(1)(C) for defendants with prior felony drug convictions without regard to drug quantity, the government concedes that there was an Apprendi error with respect to his sentences and that it was plain. The government argues that

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[3] We reject Brownlee's contention that the Apprendi error is a jurisdictional defect or a structural error requiring a per se reversal. See United States v. Nealy, 232 F.3d 825, 829 (11th Cir. 2000); United States v. Candelario, 240 F.3d 1300, 1307 (11th Cir. 2001).

Brownlee cannot show that the error affected his substantial rights, however, in light of the overwhelming and undisputed evidence at trial regarding drug quantities sufficient to support his life sentences.[4] We agree.

For example, the testimony from co-conspirators James Davis, Jr. and Roger Thompson, standing alone, accounted for well over 100 kilograms of cocaine Brownlee distributed during the course of the conspiracy. The evidence also showed that Sanford Bradshaw had provided ten kilograms of cocaine to Brownlee. The evidence further showed that Brownlee was supplied 2 kilograms of cocaine on December 17, 1996. More significantly, at sentencing and at trial, Brownlee did not dispute that the transaction on December 17, 1996, charged in Count 5, involved 2 kilograms of cocaine. Instead, Brownlee's defense was that he was not involved in that transaction on December 17, 1996. This undisputed amount of 2 kilograms of cocaine alone was sufficient to support-life sentences on both Counts 1 and 5. Moreover, we find that no evidentiary basis existed for the jury reasonably to have found that on December 17, 1996 Brownlee possessed this cocaine with intent to distribute but did not possess at least the amount necessary to trigger the statutory maximum life sentence. Because the evidence adduced at trial with respect to drug quantity was-overwhelming and more than sufficient

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[4] Because Brownlee had two prior felony drug convictions, the threshold amount to increase the statutory maximum penalty to life imprisonment was 500 grams of cocaine under 21 U. S. C. § 841(b)(1)(B)(ii).

to support Brownlee's life sentences, we conclude that there is no plain error requiring reversal of Brownlee's life sentences on Counts 1 and 5. See United States v. Swatzie, 228 F.3d 1278, 1282-83 (1 F" Cir. 2000) ("no evidentiary basis existed for the jury reasonably to have found that Swatzie possessed drugs with intent to distribute," but did not possess at least the amount necessary to trigger the maximum life sentence); United States v. Nealy, 232 F.3d 825, 829-30 (11th Cir. 2000) (holding that "given the undisputed evidence about drug quantity, no reasonable jury could have rationally concluded that Defendant was guilty of the substantive offense - possession with intent to distribute cocaine base in his backpack - but that the amount of cocaine
possessed was less than 5 grams").

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No.99-14771 BB

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICKEY BROWNLEE,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: BARKETT and HULL, Circuit Judges, and LIMBAUGH*, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CI RCUIT JUDGE

*Honorable Stephen N. Limbaugh, U.S. District Judge for the Eastern District of Missouri, sitting by designation.